

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2145

To be argued by
JAMES P. LAVIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-2145

BENJAMIN MALLAH,

Petitioner-Appellant.

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Benjamin Mallah appeals from an order of the United States District Court for the Southern District of New York, filed on October 19, 1976, by the Honorable Milton Pollack, United States District Judge, denying Mallah's petition under Title 28, United States Code, Section 2255 to vacate his judgment of conviction and sentence entered on February 26, 1974, on Indictment 73 Cr. 881.

Indictment 73 Cr. 881, filed September 20, 1973 charged Mallah, Vincent Pacelli, Jr., Alfred Catino, Barney Barrett and eight other co-defendants in eight counts with various violations of the federal narcotics laws, Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846. Trial of the defendants Mallah, Pacelli, Catino, DeFranco and Barrett commenced on December 18, 1973, before Judge Pollack and a jury. At

the conclusion of the Government's case, Judge Pollack granted motions for a judgment of acquittal on Counts Five, Six and Seven as to Mallah and on Count Four as to Pacelli. On January 8, 1974, the jury found the defendants Mallah, Pacelli, Catino and Barrett guilty on Count One, the conspiracy count. The jury also found Catino guilty on Count Two and Pacelli guilty on Counts Two and Six. Pacelli was acquitted on Counts Three, Five and Seven, and DeFranco was acquitted on Counts One and Two, the only counts in which he was named. On February 26, 1974, Judge Pollack sentenced Mallah to a term of ten years imprisonment on Count One, to be followed by a three year special parole term, and a \$25,000 fine.

Mallah's conviction, as well as the convictions of Pacelli, Catino and Barrett, were affirmed by this Court, *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974) and the Supreme Court denied *certiorari*, 420 U.S. 995 (1975).

On July 26, 1976, Mallah filed a petition to vacate his conviction pursuant to Title 28, United States Code, § 2255 on the grounds that the Government deliberately suppressed evidence favorable to him and had allowed a witness, Cecile Mileto, to perjure herself. The petition was denied without a hearing in a memorandum opinion by Judge Pollack filed on October 19, 1976. This appeal followed.

Statement of Facts

A. The Testimony at Trial

The facts underlying this important case are summarized in this Court's opinion in the original appeal. 503 F.2d at 975-976. In sum, this Court found that the Government proved a "large organization engaged in distributing heroin and cocaine in New York and that ap-

pellant Mallah acted as banker to the operation." *Id.* at 975. While a detailed summary of all of the evidence is unnecessary for the present discussion, we summarize here the testimony particularly pertaining to Benjamin Mallah; this evidence must, of course, be viewed in the context of the other evidence, which also demonstrated the existence of the overall conspiracy.*

One witness against Benjamin Mallah was Joseph Conforti. Conforti testified that in July 1971 he went to Philadelphia with Louis Mileto, where the latter delivered a kilogram of heroin to one of Herbert Sperling's customers.** After the delivery, Mileto showed Conforti a box containing \$60,000 (Tr. 650-652).*** When Conforti asked if the money was for Sperling, Mileto said, "No, its going to Bennie, one of his partners" (Tr. 653).

During the return trip to New York, Conforti asked Mileto who Bennie was. Mileto stated that "Bennie was Herbie's partner, his backup man for money problems if you needed money in the junk business, Bennie was there to give him money." He further stated that "this money was to be delivered to Bennie" (Tr. 653). In New York, Mileto picked up an additional \$17,000, which was placed

* This point is of some significance, since, as this Court has noted, once the existence of a conspiracy has been demonstrated, only "slight" evidence is needed to demonstrate a defendant's participation in it. *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974).

** Louis Mileto, Cecile Mileto's husband, had worked for Herbert Sperling, and both Conforti and Louis Mileto were named as co-conspirators. Sperling had been previously tried and convicted on July 12, 1973 for his role in the conspiracy. *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

*** "Tr." refers to the trial transcript; "App." and "Br." refers to Mallah's appendix and brief, respectively.

in the same shoe box and wrapped with the same paper. Mileto and Conforti then drove to Spring Street where Conforti remained in the car while Mileto went into Sperling's building. Some 15 or 20 minutes later Conforti saw Mallah exit the building carrying the box of money, which he recognized because of the paper with which it was wrapped. When Mileto returned to the car, Conforti asked him "who is that guy carrying the money." Mileto told Conforti that "it was Ben Mallah" (Tr. 653-656).*

In February 1972, Conforti was present at 5 Spring Street when Mallah and Sperling were in the bedroom talking to Louis Mileto following the latter's arrest. Conforti overheard Sperling berating Mileto in Mallah's presence for having extra packages of heroin which Sperling had discovered when Conforti, the day before, delivered to Sperling the heroin stored by Mileto in an apartment. Conforti also heard Sperling (who apparently concluded that Mileto had been stealing some of his heroin and selling it on his own) tell Mallah, "I told you so," to which Mallah replied, "What could you do?" (Tr. 699-700).

In November 1972, Conforti, Spada, Schworak, Sperling and Mallah were seated together at a table in the Stage Delicatessen in Manhattan. Barrett, in Mallah's presence, instructed Conforti on the procedure to be followed should Conforti run low on mix for narcotics (Tr. 717).

Barry Lipsky, also named as a co-conspirator, testified that during one of his trips with Pacelli to Ballantine's barbershop in the summer of 1971 to obtain nar-

* At trial, Conforti identified the defendant Mallah as the same Ben Mallah pointed out to him by Mileto that night. (Tr. 655-656).

cotics, Lipsky asked Pacelli to identify the people standing in front of the barbershop with Sperling. Pacelli then told Lipsky that one of the persons was "Louis" and that "Louis works for Herby" (Tr. 95). Lipsky then asked Pacelli "who's that other guy, with the bald head and the suntan and yellow sunglasses?" Pacelli told Lipsky "That's Benny Mallah, Herby's junk partner" (Tr. 95-96).

In addition, Cecile Mileto, the widow of co-conspirator Louis Mileto, testified about her knowledge of the narcotics activities of Herbert Sperling and others. With particular reference to Benjamin Mallah, she stated that shortly before Christmas, 1971 she went to 5 Spring Street with her husband. Seated by themselves in the kitchen of the apartment were Sperling and Mallah. Sperling counted a large sum of money, and when he finished, stated that "\$75,000 isn't too bad a haul" (Tr. 46-50). The \$75,000 was put into an attache case which Mallah took with him when he left the apartment (Tr. 50).

After another witness was taken out of turn, Mrs. Mileto returned to the stand and further described another visit to Sperling's apartment where she saw Mallah and Sperling standing next to a table on which she saw several packages of white powder. During the course of conversation, Mallah asked Sperling whether he would have enough money for them (Tr. 204-206).

Other Government witnesses also implicated Mallah. Patrolman Gerald Lino testified that he overheard a conversation between Sperling and Mallah on August 16, 1972, while hidden in a car, in which Sperling discussed the "stuff" (which Lino testified referred to narcotics (Tr. 1888-89)) and large sums of money. (Tr. 1182). In addition, the Government proved Mallah's flight to avoid prosecution. (Tr. 1269-74, 1281). Finally, the

Government established that Mallah was arrested in New York with more than \$8,500 in his possession and two sets of false identification papers. Indeed, at the time of his arrest, Mallah did not possess any identification in his true name. (Tr. 1258-1269; GX 74).

On his direct examination Mallah claimed he was a bookie and admitted knowing Sperling but denied knowing Pacelli. However, Lipsky had testified that he had seen Mallah with Pacelli on at least four occasions in the summer and fall of 1971. (Tr. 87, 94-96, 134, 148-149). Mallah also denied knowing Joseph Conforti, Louis Mileto, Cecile Mileto or ever being in 5 Spring Street, Herbert Sperling's apartment. (Tr. 1365-1426). On the Government rebuttal, Mallah was contradicted by Sergeant DeLuca and Cecile Mileto's son, Mark Miklitsch, all of whom placed him in conversations with Louis Mileto in 1971 and physically in Sperling's Spring Street apartment during that same year. (Tr. 1473-1476, 1480-1483).

B. Mallah's 2255 Petition

The present petition brought under Title 28, United States Code, Section 2255, is based entirely on arguments derived from the publication of a book entitled "Louie's Widow," by Cecile Mileto in collaboration with author Dave Fisher. Based on statements in the book attributed to Mileto and on transcripts of her interviews by Fisher*—each of which occurred well after the convictions in this case—Mallah argues that certain portions of

* The transcript of the interview with Cecile Mileto is included in the Appendix at pp. 24-129. Certain portions of it were included in the affidavit of Gerald L. Shargel submitted in support of Mallah's petition (A. 11-15).

Mileto's testimony dealing solely with her own use of narcotics prior to trial and with her relationship to Government agents were perjurious. Mallah further claims that the Government either knew or should have known of these facts. During her cross-examination by Mallah's defense attorney at trial, Cecile Mileto testified in part as follows:

Q. Are there any narcotic drugs with you right now? A. No, there are not.

Q. Are there any where you are living? A. No, there are not.

Q. I assume that now you have no interest in taking narcotics of any kind? A. I take pills for my nerves, which I am under doctor's care for.

Q. Other than that? A. None.

Q. In other words, as you sit there now, you are completely cured of all these drug problems that you have had? A. I have no habit. (Tr. 236).

Mallah asserts that this testimony is refuted by descriptions by Mileto in her interview of her narcotics consumption habits; he further asserts, without a single piece of evidence to support the allegation, that "[t]here can be no question that the Government agents well knew about Mrs. Mileto's involvement in drugs and, therefore, that her testimony that she took only nerve pills was false." (App. 15).

In response to Mallah's petition, the Government filed an affidavit of an Assistant United States Attorney summarizing the trial testimony (App. 130) and also affi-

davits of two narcotics agents who had the closest contact with Cecile Mileto during the period of her co-operation with the Government. In each of the latter two affidavits, the agents categorically denied knowing of Mileto's narcotics activities described in the book and transcripts (App. 150, 154); in addition, the affidavits explained numerous other claims made by Mallah in his petition.*

C. The District Court's Decision

On October 19, 1976, Judge Pollack filed a careful six-page memorandum opinion denying Mallah's petition without a hearing. (App. 155-160). In particular, Judge Pollack noted that a) there was not "a scintilla of evidence" that Mileto had lied when she testified at trial, since all of the questions concerning her drug use had been directed toward the actual time of trial, while the more recent revelations concerned earlier periods (App. 157); b) there was "no evidence to support an inference" that the agents were aware that she had used hard drugs, since the only time they had contact with her out of New York was at a time when, in the transcript, Mileto specifically said "there were no drugs around" (id.); c) the factual allegations in the affidavit were formally insufficient since they were "unfocussed, rambling, and difficult to follow," (App. 158) and contained only hearsay; and d) that claimed "gross misconduct" of the witness was in fact limited to "inconsequential incidents" (App. 159). Judge Pollack also concluded that "it is not probable, and indeed there is no significant chance, that the evidence in the transcripts could have affected the verdict." (App. 158 n.1).

* These claims included allegations that Mileto and the agents engaged in semi-nude swimming and that the agents allowed Mileto to play with their guns. (App. 15-16).

ARGUMENT

The District Court Properly Denied Mallah's Petition.

Mallah's conclusory claim that Cecile Mileto committed perjury regarding her own use of drugs and the totally unsupported charge that the Government was aware of this perjury are entirely without merit. Judge Pollack properly denied the petition without a hearing.

From a comparison of Mileto's testimony with the statements attributed to her in "Louie's Widow" and with the transcripts of her interview with author Dave Fisher, several conclusions are inescapable. First, Judge Pollack's finding that there is absolutely no showing that she actually committed perjury is manifestly correct. During cross-examination of Mileto at trial by Mallah's lawyer, both the questions and the answers were specifically directed to the present time.

"Q. Are there any narcotic drugs with you right now? A. No, there are not.

Q. Are there any where you are living? A. No, there are not.

Q. I assume that *now* you have no interest in taking narcotics of any kind? A. I *take* pills for my nerves, which I am under doctor's care for.

Q. Other than that? A. None." (Tr. 236) (emphasis added).

It is undisputed that one month prior to this testimony Mrs. Mileto had been hospitalized following her attempted suicide and was under a doctor's care. (App. 119-20). In addition, Mrs. Mileto was living in strict protective custody in New York immediately prior to

and during Mallah's trial and there is no suggestion whatsoever that she used drugs of any type during this time. (App. 110-112). Mileto's trial testimony, then, was in no way contradicted by the statements in her interviews, in which she discussed her use of drugs months prior to Mallah's trial. *A fortiori*, it follows, as the District Court specifically found, (App. 157-158), that there is absolutely no evidence tending to show that the agents knew of Mileto's alleged perjury. Not only was her testimony not perjury at all, but further it is clear that all of Mileto's narcotics consumption while in the Government's witness protection program took place in Louisiana, not New York.* According to Mileto's own interview however, the only place she met with the agents, with one exception, was outside Louisiana, and primarily in the New York area while preparing for trial. (App. 32-33, 38-39, 47, 50, 66-76, 80-82, 85, 92, 110, 112). The one exception, which occurred soon after Mileto entered the witness protection program, was when Agents Stuart Stromfeld and Gerald Lino went to Baton Rouge, Louisiana, for one week.** With respect to this week's visit, Mileto unequivocally stated that the agents had no knowledge of her drug consumption.*** Against these clear

* In "Louie's Widow" the locale is called "Georgia."

** The affidavit of Stromfeld filed in the District Court identified this week as being May 8-14, 1973—more than seven months prior to the trial. (App. 146-150).

*** "And I go home—Jerry Lino and Stui are there—my favorite agents and they are now coming down—the bust and trial are very close—to make sure I don't get into any more trouble and in fact move my children and I out of this hick town closer to New York because now I'm going to have to come in every single day for briefing. So we stay there about—they stayed about a week, fighting with U.S. Marshals. . . . So we fooled around, swimming and everything, really having fun . . . so the agents were real fun—they'd drink with me, everything, and I had started boozing it up—*there were no drugs around*. I drank wine or beer." (App. 63-64). (Emphasis added).

facts, the unsupported suggestion in Mallah's moving papers that "there can be no question that the Government well knew" (App. 15) about the claimed activities falls exceedingly flat.*

Second, even if the statements made by or attributed to Mileto were to be credited,** they simply could not have had a significant effect on the trial. Quite contrary to Mallah's suggestion (Br., p. 18-19) Mileto was not presented to the jury as a reformed and purified miscreant. During the course of extremely broad cross-examination, as well as on direct testimony, she noted that she had been convicted of narcotics offenses on several occasions; that she had other arrests and convictions

* A demonstration that Government agents actually knew about the alleged perjury is, of course, a crucial lynchpin in Mallah's motion. While a showing that the Government knowingly used perjured testimony to convict a defendant raises a constitutional issue of whether the defendant was deprived of a fair trial, *Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the same cannot be said of a naked claim that a witness committed perjury, unknown to the Government. This Court has specifically raised doubts whether such a naked claim of perjury, raising neither jurisdictional nor constitutional issues nor specifically involving the "laws of the United States," is cognizable under section 2255. *Brach v. United States*, Dkt. No. 76-2040, slip op. 5487, 5495 (2d Cir., September 9, 1976); *United States v. Franzese*, 525 F.2d 27, 31 n.7 (2d Cir. 1975).

** The District Court was clearly justified in giving grudging weight to the statements. The interview and the book were made, of course, long after trial. Not only were they not under oath, but they were plainly made with a motive to increase profits by sensationalization. Indeed, as the District Court found, the proffered material consisted only of "mere generalities or hearsay statements that will not normally entitle the applicant to a hearing. . ." *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974).

in the recent past, including one a week before her testimony for forging prescriptions (Tr. 34-37); that she was a heroin addict from 1969 to 1973, and used various type of drugs during that period; that just prior to the *Mallah* trial she tried to kill herself; and that she had been using barbiturates from March 1973 to the time of trial (Tr. 213-242). Indeed, on the very issue that *Mallah* now claims Mileto perjured herself, she specifically refused to say that she had no drug problem, answering only that she had cured her addiction:

"Q. In other words, as you sit there now you completely cured of all these drug problems that you have had? A. I have no habit." (Tr. 236; emphasis added).

Finally, she was cross-examined at length (Tr. 217-224) about her relationship with Government agents, money she received from the Government, and aid she received from the Government in dealing with her legal problems. Indeed, on one occasion she noted "They gave me my life, the government." (Tr. 222). In the face of the picture of Mileto presented to the jury, and in the context of the limited extent of her incriminating testimony of *Mallah*,* the additional impact of the new material—which, of course, related not to the substance of Mileto's testimony but to her credibility—would only have been cumulative with the other impeachment material available to and used by *Mallah*'s lawyer, see *United States v. Pacelli*, 521 F.2d 135, 137-39 (2d Cir.

* As indicated earlier in this brief, there was a considerable—indeed, overwhelming amount of incriminating evidence against *Mallah* other than the testimony of Mileto. In that part of the opinion dealing with the sufficiency of the evidence against *Mallah*, this Court devoted one sentence to summarizing Mileto's testimony.

1975), cert. denied, — U.S. — (1976), *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975), cert. denied, — U.S. — (1976). *Brach v. United States*, *supra*, slip op. 5493; Judge Pollack was clearly correct in his conclusion that "there is no significant chance, that the evidence in the transcripts could have affected the verdict." (App. 158, n.1). As this Court has held,

Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury *probably would have altered its verdict* if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975) (emphasis added). Indeed, the facts in *United States v. Franzese*, 525 F.2d 27 (2d Cir. 1975), provide a benchmark clearly demonstrating the inadequacy of Mallah's contentions here.* In *Franzese*, a key Government witness herself admitted, in a post-trial affidavit, that she had been considerably more involved in the events about which she testified than she had admitted at trial, and that the Government was specifically aware of this. Noting that much of the affidavit was "conclusory," 525 F.2d at 32, the Court concluded that even if the statements in the affidavit were to be credited the affidavit did not require either a new trial or a hearing since the possibility of the witness' involvement in the

* Mallah's attempt to suggest that Mrs. Mileto's testimony in *United States v. Collier, et. al.*, 76 Cr. 1974 (S.D.N.Y.) on April 13, 1976 lends support to his claims is totally unfounded as is his veiled suggestion that the Government acted improperly in not telling his attorney and Judge Pollack that Mrs. Mileto had testified publicly in another trial.

crime was sufficiently explored at trial. While the Court concluded that the question was "close," a comparison with the facts of this case—where Mallah has produced only unsworn and vague statements that in fact are totally consistent with the testimony at trial—reveals the hollowness of Mallah's claim.

Finally, of course, Judge Pollack was in the best possible position to assess the potential impact of the new evidence, since, like the district judge in *Franzese*, he "had the advantage of intimate familiarity with the case, born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses." 525 F.2d at 32 (footnotes omitted). His exercise of discretion, see *Machibroda v. United States*, 368 U.S. 487, 495 (1962), was clearly not abused in this case.*

* Similarly correct was Judge Pollack's conclusion that the claims of "gross misconduct" on the part of the agents during the period prior to trial were "inconsequential incidents." (App. 159). The claimed incidents, relating to semi-nude swimming and allowing Mileto to play with the agents' guns, were not only refuted in the agents' affidavits, see *United States v. Franzese, supra*, 525 F.2d at 31, but were utterly irrelevant either to the substance of Mileto's testimony or to her credibility.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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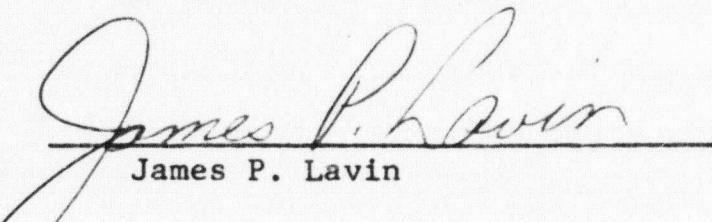
State of New York)
County of New York)

James P. Lavin being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 3rd day of January, 1977
he served a copy of the within Two (2) Copies of Appellant's Brief
by placing the same in a properly postpaid franked
envelope addressed:

Gerald L. Shargel, Esq.
Fischetti & Shargel
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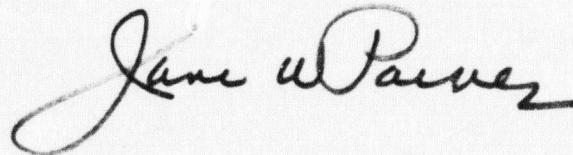
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James P. Lavin

Sworn to before me this

3rd day of January, 1977



JANE W. PARMER
NOTARY PUBLIC NEW YORK

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Commission Expires March 31, 1978